Supreme Court, U.S.
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No. 94-_____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1994**

JACK B. BUSTER,

Petitioner,

v.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST, RONALD E. GREISEN; HENRY P. HEAD,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The petitioner contends that the Court of Appeals committed errors of law in upholding the District Court conclusions as to fiduciary status under ERISA that --

(1) Buster rendered individualized investment advice or recommendations as to the advisability of investing Trust Assets in deed of trust notes, as a primary basis for investment decisions based on the Trust's particular needs;

(2) Buster rendered such advice to the Trust pursuant to a mutual agreement or understanding;

(3) Buster rendered investment advice on a regular basis;

(4) Buster rendered advice to the Trust as to the value of the deed of trust notes he offered as investments; and

(5) Buster received fees or other compensation from the Trust for investment advice.

(The disposition of the foregoing legal conclusions by the Ninth Circuit conflicts with disposition of similar legal conclusions by the Fifth Circuit, Seventh Circuit, Eighth Circuit and District of New Jersey.) See dissenting opinion, Appendix, A17, A22.

## PARTIES

Other interested parties are Terry D. Parks and Northern Financial, a partnership of Buster and Parks.

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## I. STATEMENT OF JURISDICTION

The petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Ninth Circuit Court of Appeals. The Court of Appeals issued its Opinion on May 18, 1994, __ F.3d __, Case No. 92-36732, rehearing denied on July 22, 1994, affirming the Judgment of the United States District Court for the District of Alaska in Case No. A89-071-CV (JAV). See Appendix A1 and A44.

This court has jurisdiction pursuant to 28 U.S.C. 1254(3). This Petition is being timely filed in accordance with 28 U.S.C. 2101(c).

## II. APPLICABLE STATUTES AND REGULATIONS

This case involves an employee trust fund subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001, et seq. The sections which are pertinent to this petition are the following:

29 U.S.C. 1002(14)(A):

> (14) The term "party in interest" means, as to an employee benefit plan--
>
> (A) any fiduciary (including, but not

limited to, any administrator, officer, trustee, or custodian), counsel or employee of such employee benefit plan; ....

29 U.S.C. 1002(21)(A)(ii):

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent... (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other propety of such plan, or has any authority or responsibility to do so....

29 U.S.C. 1106(a)(1):

(a) **Transactions between plan and party in interest**

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transactions constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interst, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real propety in violation of section 1107(a) of this title.

29 U.S.C. 1109(a):

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. 1131:

**Criminal penalties**

Any person who willfully violates any provision of part 1 of this subchapter or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such peson shall be a fine not exceeding $100,000.

The regulation applicable is 29 C.F.R. 2510.3-21(c)(1) (1992), the pertinent portion of which provides:

(c) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of [29 U.S.C. § 1002(21)(A)(ii)] only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other propety; and

(ii) Such person either directly or indirectly (e.g., through or together with any affiliate)--

(A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan...that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

## III. STATEMENT OF THE CASE

Thomas, Head & Greisen is a firm of certified public accountants which was formed as

a professional corporation in 1973. Initially the firm created two ERISA trusts, which were combined into one on January 29, 1981 as the Thomas, Head & Greisen Employees Trust, and the assets of the two prior trusts were rolled over into a single trust. The named trustees were David L. Ratchye, who resigned August 6, 1984, Henry P. Head and Ronald E. Greisen. The Trust assigned its cause of action in this lawsuit to Greisen and Head, as individuals, on December 28, 1990.

Neither Buster, Terry D. Parks, his partner, nor Northern Financial, their partnership, were ever named as trustees or fiduciaries to the Trust.

Buster and Greisen met in the early 1970s when Buster was a real estate broker. In early 1977, Buster and an attorney named Bill Lawrence formed a limited partnership for the purpose of investing in deed of trust notes. Buster and Lawrence were general partners and the limited partners were guaranteed a certain percentage on their investment and profits over and above that

percentage were to be split one-half among limited partners and one-half to general partners. The prospectus for the limited partnership stated that the general partners would be fiduciaries to the limited partners because they would make the decisions on investments, management and accounting. Buster was aware that Greisen and his partners had been investing in deed of trust notes, so he approached Greisen about purchasing a limited partnership interest. This resulted in the Trust investing $50,000 to become a limited partner in Kavik Mortgage Investors. The limited partnership was formed pursuant to state law and there is no mention of ERISA in its documents. Buster testified that he did not know what ERISA was at the time the limited partnership was formed.

Subsequently, after discussions with Greisen and others who were investing in deed of trust notes, Buster decided to go into business buying and selling deed of trust notes. He advertized in the newspapers, the yellow pages of the

telephone book and informed bankers of his interest in buying notes at a discount. He would evaluate a note based on its yield. Initially, Buster intended to hold all of the notes himself, but he ran out of money, so he held some and sold others. In a period of about 10 years he bought and sold hundreds of deed of trust notes. Many of them were offered to Greisen because they met criteria which had been specified by Greisen. Over a nine-and-a-half-year period between 1977 and 1986, the Trust acquired 61 such notes from Buster and/or Northern Financial. In the three years Northern Financial was in business, 1983 to 1986, the Trust acquired 36 notes from it at a cost of $727,000, which comprised about 40 percent of the Trust assets. Greisen met Parks in 1983 or 1984 and he was told Parks was Buster's new partner. After that, notes were purchased from Northern Financial. All investment decisions were made by the trustees after at least two trustees had looked at each deal.

This lawsuit related to four specific deed

of trust notes which were purchased by the Trust from Northern Financial. However, Buster guaranteed one of the four and the Trust claimed no loss as to it, so the $142,745 damage award by the District Court was based on the remaining three.

The Trust, Greisen and Head filed suit against Northern Financial, Buster and Parks on February 24, 1989 alleging mail and securities fraud, racketeering (RICO), breach of fiduciary duties under ERISA and violation of the Alaska Securities Act. The RICO counts were dismissed October 10, 1991. About the same time, an Amended Complaint was filed alleging common law misrepresentations.

After the District Court denied the defendants' motion for summary judgment on the ERISA count on May 1, 1992, the parties filed a statement of stipulated facts and disputed facts on June 2, 1992 and a three-day bench trial was held June 8-10, 1992. The Findings and Conclusions of the court dated July 29, 1992 held that Northern

Financial and its partners were fiduciaries to the Trust under ERISA, that they breached their fiduciary duties, which caused losses to the Trust and the Trust reasonably mitigated its damages. The court found that the damage award under ERISA fully compensated the plaintiffs, so there was no need to rule on securities claims, and the court found that the ERISA claims preempted the common law misrepresentation claims. Judgment was issued on August 17, 1992.

As previously noted, the District Court Judgment was affirmed on May 18, 1994 by the majority of a three-member panel of the Ninth Circuit Court of Appeals.

The District Court had federal question jurisdiction over the ERISA claim pursuant to 28 U.S.C. 1331(a). The Court of Appeals had jurisdiction under 28 U.S.C. 1291.

## IV. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

### A. The Court of Appeals Applied the Wrong Standard of Review.

The dissenting judge pointed out that the

majority erroneously applied the clear error rule. See, Appendix at A17.

The District Court made seven findings re fiduciary status of the defendants. Appendix at A36-A39. Six of those "findings" in reality were legal conclusions reached by applying the statutes and regulations to facts about which there was little or no dispute. In Buster's brief to the Court of Appeals, he acknowledged that findings of fact are reviewed under the clearly erroneous standard, but stated also, "The Court of Appeals is not bound to accept findings of fact which are based on the trial court's erroneous view of the law." In re Aldman, 541 F.2d 999, 1005 (2nd Cir. 1976), citing, United States v. Gypsum Company, 333 U.S. 364, 394, 68 S.Ct. 525, 92 L.Ed. 746 (1948); 5 A. Moore, Federal Practice, ¶ 52.02[2], at 2264. In Pullman-Standard v. Swint, 466 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982), this court explained:

> [W]here findings are infirm because of an erroneous view of the law, a remand is the

> proper course unless the record permits only one resolution of the factual issue.

See, also, dissenting opinion, 456 U.S. at 299, 102 S.Ct. at 1795.

The majority of the Court of Appeals relied on this court's pronouncement in Anderson v. Bessemer City, 470 U.S. 562, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)("If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently") to hold that the District Court's "findings" were not "clearly erroneous." But there was little dispute about the District Court's account of the evidence. The dispute involved the District Court's conclusions, which were called "findings," reached by applying the ERISA statutes and regulations to the facts. In Buster's brief, it was repeatedly asserted that these conclusions were "clearly erroneous," which

they were, but it was also pointed out that they were based on the trial court's erroneous view of the law, and consequently were errors of law. The dissenting judge said, "This court must review the legal conclusion that Buster was an investment advisor under ERISA de novo." Appendix, A17.

B. The Court of Appeals Committed Errors of Law in Upholding the District Court's Conclusions as to Fiduciary Status Under ERISA.

It was not contended in this case that Buster was a fiduciary to the Trust based on exercise of any discretionary authority or control as to Trust administration or disposition of Trust assets. The only other way he could become a fiduciary without being named as such was pursuant to 29 U.S.C. 1002(21)(A)(ii): "to the extent...he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has authority or responsibility to do so." By regulation, the Department of Labor has

identified five essential elements, all of which are necessary, to constitute fiduciary status for rendering investment advice. These essential elements are included in 29 C.F.R. 2510.3-21(c)(1)(i) and (ii)(B), previously quoted herein and are all included in the District Court's findings as to fiduciary status. Appendix, A36-A39. The five essential elements, as understood by Buster, are set forth as the "Questions Presented" inside the front cover of this Petition.

The District Court's conclusion as to each of the five essential elements was based on an erroneous view of the law and should have been reviewed de novo by the Court of Appeals. Upon such review, the Court of Appeals should have concluded that the District Court's "finding" as to each of the five essential elements was erroneous. A conclusion that any one of the five was erroneous would have required reversal.

The factual controversy in the case was about whether there were misrepresentations, allegedly the basis for breach of fiduciary

duties, and about damages. Although Buster does not concede that there were any material misrepresentations, that was not an issue in the appeal and is not an issue here. For appeal purposes, the District Court's Findings of Fact were assumed to be sustainable. See, A42 to A54.

As to the manner in which Buster (and later Parks) offered deed of trust notes to the Trust as investments, there was no material controversy. Greisen and Head were knowledgeable investors with experience in investing in deed of trust notes and real property. Buster also was experienced in dealing in real property and he was in the business of buying and holding or selling deed of trust notes. He located such investments through advertizing and he screened them by reviewing title information, assessed values, credit information, payment history and location and condition of the collateral property. He would calculate a yield based on a discounted value. Once the investment was acquired, if Buster was not in a position to hold it, he would

offer it for sale to one or more of about 20 customers, including the Trust. From experience and conversations with Greisen and based on specifications Greisen had given him, he was able to recognize particular investments which may interest Greisen and the other trustees.

If Buster had a deed of trust note for sale which he thought may interest the Trust, he would offer it to Greisen. He would describe it by amount, maturity, payment history, location and type of property, and credit information about the maker of the note, including employment, income and other assets, to the extent known. Sometimes he would obtain the assessed valuation from the taxing authority, but it was his understanding that Greisen virtually always checked such information himself. If Buster could offer the note at a discounted price which would afford a 20 percent per annum yield, he would make available his calculations to Greisen, but he knew that Greisen would always make his own calculations. Buster called this an offer

with descriptive information. In his trial testimony, Greisen called what Buster did investment advice and recommendations.

Buster was in business to make money, so he sold the notes for more than he paid for them. The "spread" or "margin" between purchase price and sale price would pay his expenses, pay for his time and possibly result in a profit. The District Court concluded that the margin was a fee or compensation for investment advice.

Greisen testified that he met quite often with Buster and Parks to discuss investment criteria including diversification of types of properties, locations of properties, economic conditions and how to evaluate credit. Greisen indicated that sometimes six months or more would pass and he would not be in contact with Buster. A list of 61 investments from 1977 to 1986 provided by Greisen indicated gaps of six months or more between investments and at least one gap of two years in which there was only one transaction.

Buster contends that the foregoing activities did not amount to investment advice which would make him a fiduciary to the Plan or Trust. In reality, error of law is required to arrive at a conclusion that Buster's activities constituted any of the five essential elements to create fiduciary status.

1. Individualized investment advice.

Greisen acknowledged in his trial testimony that no copy of the Trust documents was ever provided to Buster prior to this lawsuit. He also acknowledged that he did not expect Buster to list all of the Trust assets and there was no evidence that Buster was ever informed of the Trust portfolio. Buster did not know the total Trust assets, the diversification among types of investments or investments other than those he had sold to the Trust. According to Greisen, the Trust invested $727,000 with Buster and Northern Financial in deed of trust notes. Buster knew about that. But Greisen said that investment amounted to about 40 percent of the Trust assets.

Buster did not know that.

In Farm King Supply, Inc. v. Edward D. Jones & Company, 884 F.2d 288, 294 (7th Cir. 1989), the court explained:

> Jones could not provide "individualized investment advice to the plan based on the particular needs of the plan" without knowing the composition of the Plan's portfolio. ...Moreover, it would certainly be folly to rely on the advice of a broker lacking such fundamental information, and the trustees themselves were not without business experience and sophistication. In the absence of such information, Jones' suggestions as to investment could not constitute rendering individualized advice "regarding such matters as among other things, investment policies or strategy, overall portofolio composition, or diversification of plan investments"....

As a matter of law, according to the Seventh Circuit, a broker in a position analogous to Buster's position could not provide individualized investment advice based on the particular needs of the plan, even though in that case, approximately 99 percent of the plan's assets, in excess of $1,000,000, were invested through Jones, whereas no more than 40 percent of this Trust's assets were invested through Buster.

The conflict as to this essential element between this case and the Farm King case is insurmountable. Moreover, the pronouncement in Farm King is sound and well-reasoned.

The decision in this case as to this essential element is also in conflict with Consolidated Beef Industries, Inc. v. New York Life Insurance Company, 949 F.2d 960 (8th Cir. 1991). That court held that an insurance broker was not providing investment advice by selling his company's products, nor was the company, which did not recommend specific investments beyond its products. 949 F.2d at 965. Similarly, Buster merely sold his own company's products to the Trust.

American Federation of Unions Local v. Equitable Life Assurance Society, 841 F.2d 658, 664 (5th Cir. 1988) is also in conflict with the conclusion as to this element of fiduciary status in this case ("Simply urging purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products.")

2. Buster was not a party to any mutual agreement or understanding.

The Court of Appeals majority opinion states, "The fact that Buster did not believe that he was a fiduciary to the Trust is of no consequence," citing four cases to support that statement. Appendix, A10. None of those cases involve fiduciary status through rendering investment advice as described in 29 C.F.R. 2510.3-21(c)(1)(B). All of those cases involve fiduciary status based on the fiduciary functions of exercising discretionary control in management and disposition of trust assets. The undisputed evidence in this case establishes that Buster had no discretionary control in management or disposition of Trust assets. All investment decisions were approved by at least two of the named trustees.

Referring to Part (ii)(B) of the regulation, the opinion in Olson v. E.F. Hutton & Company, Inc., 957 F.2d 622, 626 (8th Cir. 1992) states: "These regulations were adopted to ensure brokers

are not given fiduciary status without their knowledge." The Ninth Circuit has given Buster fiduciary status without his knowledge, contrary to the applicable regulation and in conflict with the Eighth Circuit.

Farm King, 884 F.2d at 293, explains that the mutual agreement or understanding must include "that Jones would provide to the Plan individualized investment advice which would be the primary basis for the Plan's investment decisions." Such agreement or understanding is comparable to the corresponding "meeting of the minds" component of contract cases. 884 F.2d at 293 n. 6. As in Farm King, the fact that Buster had no knowledge of the Trust's portfolio, the Trust Instrument, the total amount of the Trust assets or the amount of cash the Trust had available at any given time, negates any possibility, as a matter of law, that he could have agreed to render individualized investment advice based on the Trust's particular needs or that the trustees could have relied on any advice he gave as a

primary basis for investment decisions.

Furthermore, under the circumstances of this case, if any such agreement or understanding had existed, recognition of it by the courts amounts to approval of a criminal conspiracy. Under 29 U.S.C. 1002(14)(A), the term "party in interest" includes "any fiduciary." Prohibited transactions are listed in 29 U.S.C. 1106 which proscribes any fiduciary with respect to a Plan, i.e., Greisen and Head, from causing "the Plan" to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--(A) sale or exchange, or leasing, of any property between the Plan and a party in interest; ...." Thus, if Greisen and Head knew or should have known that Buster was a fiduciary, each purchase from him, Parks or Northern Financial constituted a prohibited transaction. Not only are such transactions prohibited, they are misdemeanors. 29 U.S.C. 1131. Thus, the Ninth Circuit Court of Appeals has upheld the District Court in concluding that the parties to this case entered into an

agreement or understanding to engage in transactions which are prohibited by the applicable statutes and to enforce those transactions, even though each such transaction is a misdemeanor. This constitutes an obvious error of law, which the courts in other circuits have avoided. In Farm King, the court explicitly recognized that each such transaction would be prohibited by 29 U.S.C. 1106. 884 F.2d at 294 n. 8.

The District Court also inferred that Buster's fiduciary status as a general partner in Kavik Mortgage Investors, in which the Trust became a limited partner, also made Buster a fiduciary under ERISA. The flaw in such a conclusion is pointed out in the dissenting opinion. Appendix, A17-18. A person is a fiduciary under ERISA only as to the particular activity at issue. Coleman v. Nationwide Life Insurance Co., 969 F.2d 54, 61 (4th Cir. 1992). This court has expressed its unwillingness to infer causes of action in the ERISA context which are not clear in the statutes' "carefully crafted and detailed

enforcement scheme." Mertens v. Hewitt Associates, __ U.S. __, 113 S.Ct. 2063, 2067 (1993).

The conflict of interest Buster would have in selling his own property to the Trust and at the same time providing investment advice as to that property in a fiduciary capacity is obvious. The need for dealings between Buster and the Trust to be on an arm's length basis is equally obvious. That is why the statute prohibits transactions with fiduciaries. The District Court and the Court of Appeals had to misconstrue the statute to infer the existence of such an agreement.

3. Buster did not render investment advice on a regular basis.

Although Buster participated in the sale of 61 deed of trust notes to the Trust over a nine-and-a-half-year period, the transactions were intermittent, with gaps of six months on occasions and two years in which there was only one transaction on at least one occasion. Greisen testified that sometimes he would not hear from Buster for several months.

No cases have been found in which the "regular basis" requirement has been analyzed extensively. In Schloegel v. Boswell, 994 F.2d 266 (5th Cir. 1993), Boswell was an advisor to the company's pension plan for more than 20 years, but performed a more limited role with respect to the company's profit-sharing plan. However, he gave advice as to investment in life insurance in 1977 and 1980. This was not investment advice on a regular basis. 994 F.2d at 273. In American Federation of Unions v. Equitable, 841 F.2d at 664, the insurance company did not give investment advice on a regular basis merely by urging the purchase of its products. In Brown v. Roth, 729 F.Supp. 391, 397 (D. N.J. 1990), an accountant who served as an advisor for many years did not meet the regular basis requirement, as a matter of law, by giving advice on two occasions about investing in second mortgages.

In Batchelor v. Oak Hill Medical Group, 870 F.2d 1446, 1447 (9th Cir. 1989), the court said: "The district court's construction of ERISA is a

question of law, reviewed de novo." In order to determine that Buster gave investment advice on a regular basis, it was necessary to construe ERISA, so the Court of Appeals should have reviewed that conclusion de novo. On intermittent and numerous irregular occasions, Buster offered deed of trust notes, providing descriptive information, to trustees whose expertise about such investments was at least equal to Buster's. The court should not have construed ERISA to arrive at the conclusion that such activities amounted to rendering investment advice on a regular basis.

4. Buster did not render advice as to the value of the deed of trust notes he offered as investments.

It is undisputed that before each transaction, Buster made available to the trustees the investment documents, including the deed of trust notes, deeds of trust and payment history. He also calculated the yield based on the discounted sale price at which he was offering the investments. It is also undisputed

that the trustees are certified public accountants and that Greisen made his own yield calculations. Usually, Buster would ascertain the assessed valuation of the collateral property from the public records of the taxing authority, and, if he had it, he would give that information to the trustees. Greisen acknowledged that he frequently made his own inquiry as to assessed valuation. Buster never represented to anyone that he was an appraiser, nor did he ever provide an appraisal or estimate of value. All he did was provide information from existing records and a mathematical calculation, knowing that Greisen, who was at least equally adept, would make his own calculations as to yield.

A relationship similar to Buster's relationship with the Trust was described in Farm King, 884 F.2d 292, as "simply salesmanship, matching the customer's desires with available inventory." As in Farm King, 884 F.2d at 294, the trustees listened to Buster's solicitations because they proved successful in the past and Buster, of

course, nurtured customer loyalty. The fact that Buster was good at his job is attested by the fact that only three of the speculative investments he sold did not measure up to the trustees' yield expectations, even during a bad economic period in which more than half of the banks in the state failed.

Similarly, in Consolidated Beef Industries, 949 F.2d at 965, the court said, "Billings was merely a salesperson earning commissions and not a fiduciary under ERISA," and "NYL simply sold CBI annuities; it did not recommend specific investments beyond its products." The circumstances were comparable to Buster's relationship with the Trust in this case. As in Schloegel v. Boswell, 994 F.2d at 273, the trustees did not rely exclusively on Buster's information, but made their own decisions based on their own knowledge, although if Buster approached them they were willing to listen. Consequently, Boswell's advice did not make him a fiduciary under ERISA and neither should Buster's.

5. Buster did not receive fees or other compensation from the Trust for investment advice.

Buster's only compensation was the profit margin between the prices he paid for the deed of trust notes and the prices at which he sold them. Out of that margin, he had to pay his overhead expenses which included telephone expenses, travel expenses, advertizing expenses, office expenses and many others. He spent his own time in locating potential investments, evaluating them and offering them for sale to his customers.

In order to conclude that the profit margin constituted fees or other compensation for investment advice, it was necessary for the District Court to construe ERISA, which is a question of law, and should have been reviewed de novo by the Court of Appeals. Batchelor v. Oak Hill Medical Group, 870 F.2d at 1447.

All courts which have considered this issue, except the Ninth Court Court of Appeals and the District Court for the District of Alaska, have held that similar conduct does not amount to

rendering investment advice for a fee or other compensation under ERISA. See, American Federation of Unions v. Equitable, 841 F.2d at 664 ("simply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products."); Consolidated Beef Industries v. New York Life Insurance Co., 949 F.2d at 965 ("Billings was merely a salesperson earning commissions and not a fiduciary under ERISA."); Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d at 294 ("Finally, the trustees were aware that Jones' only source of compensation from these transactions was from the commissions offered by the issuers of the securites."); Flacche v. Sun Life Assurance Co. of Canada (U.S.), 958 F.2d 730, 734 (6th Cir. 1992)(An insurance company selling an annuity contract does not constitute investment advice for compensation under ERISA). In Associates in Adolescent Psychiatry v. Home Life Insurance Co., 729 F.Supp. 1162, 1191 (N.D. Ill. 1989), affirmed on other grounds, 941 F.2d

561 (7th Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 1182, 117 L.Ed.2d 426 (1992), the court held that an insurance company recommending its products as a means of funding retirement benefit plans does not constitute rendering investment advice for a fee under ERISA, citing Farm King, supra and American Federation of Unions v. Equitable, supra, as authorities. The erroneous decision of the Ninth Circuit Court of Appeals in this case is in conflict with all of these decisions from other circuits.

C. This Court Should Grant the Writ Due to the Pervasiveness of ERISA and the Need for National Uniformity in Its Application.

The size, scope and numbers of employee benefit plans and their effects on interstate commerce and federal taxing powers are recognized by Congress in its Findings and Declaration of Policy for the legislation, 29 U.S.C. 1001, and its additional Findings and Declaration of Policy in 29 U.S.C. 1001(a). ERISA plans pervade the national economy and perhaps a majority of the

citizens are participants. The titles to cases in which ERISA issues have been litigated is a compendium of investment firms and insurance companies which do business on a national scale. In order to do such business, it is imperative that the courts throughout the nation construe the legislation uniformly. It is intolerable for ERISA to be construed in one manner in the Second Circuit, Fifth Circuit, Seventh Circuit and Eighth Circuit and to be construed in a contradictory and conflicting manner in the Ninth Circuit. If this case remains as a precedent in the Ninth Circuit, firms dealing in insurance plans and securities will have to be extremely cautious in dealing with plans within the jurisdiction of the Ninth Circuit Court of Appeals, lest they unknowingly become ERISA fiduciaries by describing the investments they offer to plan trustees. So long as justice continues to be blindfolded and deal with litigants on an equal basis, the Ninth Circuit Court of Appeals cannot distinguish between a

small businessman from Alaska and a large national investment firm.

## V. CONCLUSION

This court is urged to grant the writ and upon hearing this case, to reverse the Court of Appeals and thereby resolve the conflict between the Ninth Circuit Court of Appeals and the other circuit courts of appeals.

Respectfully submitted the 14 day of October, 1994.

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN; HENRY P. HEAD, Plaintiffs-Appellees, | |
| v. | No. 92-36732 |
| JACK BUSTER, Defendant-Appellant, | D.C. No. CV-89-071-JVH |
| and | OPINION |
| TERRY D. PARKS and NORTHERN FINANCIAL, Defendants. | |

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

Argued and Submitted
November 4, 1993--Seattle, Washington

Filed May 18, 1994

Before: Alfred T. Goodwin, Procter Hug, Jr., and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Hug; Dissent by Judge Ferguson

**OPINION**

HUG, Circuit Judge:

This appeal concerns the investment by an ERISA-regulated Employee Trust Fund in deed of trust notes secured by real property. The Trust purchased various notes from Northern Financial, a general partnership comprised of Jack Buster and Terry Parks. Appellant Buster challenges the district court's determination that he served as a fiduciary to the Trust, and that he was liable to the Trust for breach of fiduciary duty for misrepresentations made with respect to the sale of deed of trust notes. We affirm.

I.

BACKGROUND

Thomas, Head & Greisen Employees Trust ("Trust") is an employee trust fund subject to the Employee Retirement Income Security Act ("ERISA"). The Trust was established by Thomas, Head & Greisen, a professional corporation of certified public accountants. Jack Buster developed a business relationship with the

trustees of the Trust, Henry Head and Ronald Greisen ("Trustees"), whereby Buster would locate and investigate deed of trust notes for investment by the Trust. Buster earned a commission from the sale of these notes.

In 1983, Buster joined Terry Parks and formed a general partnership, Northern Financial. Northern Financial continued to provide investment services to the Trust, and the Trust continued to purchase notes secured by deeds of trust. During 1986, the Trust purchased four such notes from Northern Financial, referred to as the Bergin, Kern, Falkenstein and Smith notes. Subsequent to the pruchase, the Trust discovered that Northern Financial had made numerous misrepresentations with respect to each of those notes.

On February 24, 1989, the Trust filed suit in federal district court alleging losses in excess of $142,000 on the Bergin, Kern and Falkenstein notes. The Smith note was not a subject of the litigation because Buster admitted the misrepresentations and guaranteed the Trust a 20 percent

return on its investment. Although the suit alleged numerous statutory violations, the case was tried primarily on the basis of a breach of fiduciary duty under ERISA. After a three-day bench trial, the district court ruled that Northern Financial and its partners breached their fiduciary duties. The court awarded damages in the amount of $142,745.71. Buster appealed. A companion appeal brought by co-defendant Terry Parks was dismised by stipulation pursuant to Federal Rule of Appellate Procedure 42(b).

## II.

## FIDUCIARY STATUS

[1] The primary issue in this appeal concerns Buster's status as a fiduciary within the meaning of ERISA. Buster challenges the district court's finding that he was a fiduciary and its ultimate conclusion that he was liable for breach of fiduciary duty. The findings upon which Buster bases his appeal are essentially factual issues, and therefore the court's findings cannot be set aside unless they are

"clearly erroneous." Fed. R. Civ. P. 52(a). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1317 n. 7 (9th Cir.)(quoting Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985)) (internal quotations omitted), cert. denied, __ U.S. __, 112 S.Ct. 3056 (1992).

ERISA provides three ways in which one can acquire fiduciary status: (1) exercising discretionary authority or control over management of the plan or disposition of its assets; (2) rendering investement advice for a fee or other compensation; or (3) exercising discretionary authority in the administration of the plan. 29 U.S.C. § 1002(21)(A) (1988). The district court determined that Buster fell within the second definition of fiduciary, which states that a

person acquires such status if "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii).

The Department of Labor issued regulations that further define "rendering investment advice" within the meaning of ERISA. The relevant provision states:

> (c) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of [29 U.S.C. § 1002(21)(A)(ii)] only if:
>
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) Such person either directly or indirectly ....
> ....
>
> (B) Renders any advice...on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan...that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment

> advice to the plan based upon the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21(c)(1) (1992).

[2] Courts have recognized that an investment advisor to an ERISA Trust may be deemed a fiduciary of the Trust. See Schetter v. Prudential-Bache Securities Inc., 695 F.Supp. 1077, 1083 (E.D. Cal. 1988); Stanton v. Shearson Lehman/American Express, Inc., 631 F.Supp. 100, 103-104 (N.D. Ga. 1986). Moreover, the definition of fiduciary under ERISA should be liberally construed. See Consolidated Beef Indus. Inc. v. New York Life Ins. Co., 949 F.2d 960, 964 (8th Cir. 1991), cert. denied, 112 S.Ct. 1670 (1992).

The district court made factual findings to support its conclusion that Buster was a fiduciary within the meaning of ERISA. Specifically, the court found that (1) Buster provided individualized investment advice; (2) the advice was given pursuant to a mutual understanding; (3) the advice was provided on a regular basis; (4) the

advice pertained to the value of the property or consisted of recommendations as to the advisability of investing in certain property; and (5) the advice was rendered for a fee. All five factors are necessary to support a finding of fiduciary status. 29 U.S.C. § 1002(21)(A)(fee); 29 C.F.R. § 2510.3-21(c)(1)(i)(value of property, advisability of investing in property); 29 C.F.R. § 2510.3-21(c)(1)(ii)(B)(regular basis, mutual agreement, individualized advice). Buster challenges each of these findings.

A. Individualized Investment Advice

Buster asserts that no evidence exists to support the district court's finding that he provided individualized investment advice. Rather, he argues that he was merely selling a product to the Trust. We disagree.

Regulations interpreting ERISA provide that a person may attain fiduciary status by rendering individualized investment advice "based on the particular needs of the plan regarding such matters as, among other things, investment poli-

cies or strategy, overall portfolio composition, or diversification of plan investments." 29 C.F.R. § 2510.3-21(c)(1)(B). The evidence presented at trial established that Buster engaged in regular meetings with the Trustees, during which they discussed investment strategies, the need for diversification, and the criteria used by Buster to determine which investments were suitable for the Trust.

Buster was providing investment advice to sophisticated customers, but this does not affect the finding that he was rendering individualized investment advice nonetheless. Moreover, Buster's assertion that he was unable to provide individualized investment advice because he had not been given the investment portfolio or trust documents similarly lacks merit. The relationship of the parties, which developed over the course of nine years, coupled with the evidence of regular meetings between Buster and the Trustees to discuss investment strategy, provided Buster with sufficient information about the Trust to enable

him to render individualized investment advice.

Buster's reliance on Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288 (7th Cir. 1989), is misplaced. In Farm King, the court concluded that the brokerage firm was not a fiduciary to an ERISA plan because it had not agreed to render "individualized investment advice" upon which the Plan would rely as a primary basis for investment decisions. The court specifically found that the alleged fiduciary's recommendations as to investments did not amount to advice as to investment strategy, overall portfolio composition or diversification of assets. Id. at 294. Rather, the brokerage firm in Farm King acted only as a sales broker, and its activities consisted of individualized solicitations designed to obtain business from a lucrative customer. Id.

An inference from Farm King, which suggests that a fiduciary must review an entire portfolio in order to give "individualized investment advice [] based on the particular needs of the

plan," id., is inappropriately applied to the present case. Here, an investment advisor rendered advice as to one type of investment and professed to understand the Trust's needs in that area. The record reflects that Buster advised the Trust about, and recommended the purchase of, virtually its entire portfolio of deed of trust notes.

The Eighth Circuit's opinion in Consolidated Beef Industries, which concluded that a fiduciary relationship did not exist between a life insurance salesman and the trustees of a company's employee retirement plan, is similarly unavailing. 949 F.2d at 964-65. The Eighth Circuit concluded that the insurance salesman was not acting as a fiduciary, but rather was merely selling his company's financial products to the plan. Contrary to Buster's argument, significant differences exist between Consolidated Beef and the present case. First, there is an important distinction between and agent or broker selling uniform commercial products of a reputable insur-

ance company and the sale of deed of trust notes secured by real property with highly individualized characteristics. Those who invest in deed of trust notes must have an appreciateion of the risks involved with such investments. Second, the Consolidated Beef case does not reflect the same level of interrelationship between the sales agent and the trust that is demonstrated by the nine and one-half-year relationship between the parties in the present case. Thus, we conclude that the district court did not clearly err in deterining that Buster was providing individualized investment advice to the Trust.

B. Mutual Agreement

Buster asserts that he never agreed to serve in a fiduciary capacity to the Trust as part of Northern Financial. The appellees acknowledge that there was not a written document memorializing their agreement, and that Buster was never added to the trust agreement as a fiduciary. Although a mutual agreement must be found to exist between the parties, the agreement need not

be in writing nor must it specify that the party was to act as a fiduciary. Rather, the party need only agree to provide advice that is the primary basis for the Plan's investment decisions. Farm King, 884 F.2d at 293. "[A]n agreement or understanding must have existed between the parties, not necessarily that [the defendant] would serve as a fiduciary, but that [he] would provide to the Plan individualized investment advice which would be the primary basis for the Plan's investment decisions." Id.

The Eighth Circuit addressed this issue in Olson v. E.F. Hutton & Co., Inc., 957 F.2d 622, 624 (8th Cir. 1992). There, trustees of two employee benefit plans brought suit against a securities broker to recover losses caused by the excessive buying and selling of certificates of deposit on the trust's account. The district court granted summary judgment in favor of the defendants on the basis that there was no evidence of an actual agreement between the parties. Id. at 627. The Eighth Circuit reversed the

district court's decision and remanded because the record demonstrated to a degree sufficient to withstand summary judgment that the parties had an understanding that the broker's investment advice would serve as the primary basis for the investment decisions of the plan. Id.

The facts in the present case support a finding that the requisite mutual agreement existed between the parties. Buster's relationship with the Trust spanned a period of over nine years, involved the investment of over $700,000, and affected over 40 percent of the Trust's assets. Moreover, evidence presented at trial established that the parties met frequently to discuss investment strategy and diversification, as well as the criteria by which the notes would be selected. The agreement between the Trust and Buster required Buster to locate suitable investments, evaluate them and make recommendations to the Trust. The fact that the Trust acted so promptly on Buster's recommendations further evidences the existence

of the requisite agreement.

Furthermore, it is irrelevant that Buster did not believe that he was fiduciary. "[An] alleged fiduciary's state of mind is not determinative of fiduciary status under ERISA." McNeese v. Health Plan Marketing, Inc., 647 F.Supp. 981, 985 (N.D. Ala. 1986). See also Donovan v. Mercer, 747 F.2d 304, 308 n. 4 (5th Cir. 1984)("[A] person's state of mind does not determine his or her fiduciary status under ERISA."); Kerns v. Benefit Trust Life Ins. Co., 790 F.Supp. 1456, 1460 (E.D. Mo. 1992), aff'd, 992 F.2d 214 (8th Cir. 1993); Successor Trust Committee v. First State Bank, 735 F.Supp. 708, 716 (W.D. Tex. 1990). The fact that Buster did not beleive that he was a fiduciary to the Trust is of no consequence. We conclude that the district court's determination that the requisite mutual agreement existed was well supported by the evidence and was not clearly erroneous.

C. "Regular Basis" Requirement

A finding that the investment advisor

rendered advice on a "regular basis" is essential to a determination that a fiduciary relationship existed. American Federation of Union Local 102 v. Equitable Life Assurance Society, 841 F.2d 658, 664 (5th Cir. 1988). We agree with the district court that the facts support a finding that Buster rendered investment advice to the Trust on a regular basis. The fact that the Trust purchased 61 deed of trust notes from Buster over a nine and one-half-year period, as a result of regular meetings, reflects the regularity of the advice.

Moreover, Buster gave far more regular investment advice than the investment advisor in Schloegel v. Boswell, 994 F.2d 266 (5th Cir.), cert. denied, 114 S.Ct. 440 (1993). In that case, the plaintiff brought a lawsuit alleging breach of fiduciary duty against an insurance salesman who allegedly induced an ERISA-regulated profit sharing plan to invest in certain life insurance policies, the purchase of which violated federal tax regulations governing tax-deferred profit

sharing plans. Id. at 268. The Fifth Circuit concluded that the record did not support a finding that the defendant "rendered investment-type advice to the Profit Sharing Plan on a regular basis." Id. at 273. The plan trustees identified only a few, isolated instances in which the insurance agent gave investment advice. Such a situation is far different from the present case in which regular meetings between Buster and the Trustees resulted in the purchase of 61 deed of trust notes, over a nine and one-half-year period. The district court's conclusion was not clearly erroneous.

D. Advice as to Value of Securities

"A person shall be deemed to be rendering 'investment advice'" if he advises "as to the value of securities or other property, or makes recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property." 29 C.F.R. § 2510.3-21(c)(1)(i).

Buster made recommendations as to the advisability of investing in certain deed of trust

notes. Specifically, he provided information to the trustees as to the value of various deed of trust notes by virtue of the yield calculations, mortgage analyses, and price information. He also provided descriptions of the property, and information pertaining to the payor's payment history and the payor's employment. We conclude that these details clearly relate to the value of the notes because they reflect the likelihood that the note would be paid in full. Thus, the district court's finding that Buster rendered advice as to the value of securities is not clearly erroneous, particluarly in light of the lack of conflicting evidence in the record.

E. Receipt of Compensation

ERISA provides that a person is a fiduciary if "he renders investment advice for a fee or other compensation, direct or indirect." 29 U.S.C. § 1002(21)(A)(ii). Buster typically received a 10 percent commission on the sale of deed of trust notes to the trust. On the particular notes at issue in the present case,

Buster purchased various deed of trust notes, and subsequently resold them to the Trust at a higher price. Thus, Buster's compensation amounted to the difference between the amount at which he purchased the deed of trust notes, and the price at which he was able to resell them to the Trust. Buster asserts that this compensation is not a fee for investment advice, but rather represents the profit earned by a salesperson for the sale of his product. We disagree. The commission earned on the sales and the profit earned by the spread represent "fee[s] or other compensation" for the rendering of investment advice. The court's conclusion is not clearly erroneous.

[3] Our review of the five requisite elements leads us to conclude that Buster rendered individualized investment advice for a fee within the meaning of ERISA. We find that the existence of a fiduciary relationship in the present case is not affected by the fact that deed of trust notes were bought by Buster, and subsequently resold to the Trust. In serving as an investment

adviser to the Trust for a nine and one-half-year period, Buster operated as a fiduciary. This status carries with it the responsibility to act in the best interest of the client at all times, and to serve with scrupulous good faith. Buster's conduct in this case clearly violated this standard, regardless of how the various transactions were structured. We will not permit a fiduciary to avoid his responsibilities merely by structuring a financial transaction so as to achieve that goal. The district court's conclusion that Buster served the Trust as a fiduciary was proper.

III.

CAUSATION

Buster also challenges the district court's conclusion that misrepresentations pertaining to the three notes in question caused the Trust losses in excess of $140,000. Specifically, Buster asserts that there was insufficient evidence to support the court's finding that the statements were material, and that they were relied upon by the trust. We reject Buster's

contentions and agree with the district court that Buster's actions were responsible for the losses to the Trust. Each of the three notes at issue will be discussed individually.

A. The Bergin Note

The district court found that Buster misrepresented that the Bergin property was located in the Wonder Park subdivision of Anchorage when, in fact, it was located next to railroad tracks in the Spenard area of Anchorage, and also found he misrepresented the assessed value of the property. The court further found that Buster failed to disclose that there was insufficient access to the property. We reject Buster's contention that the Trustees' failure to discover these defects reflects negligence on their part, absolving him of responsibility for the losses. The representations were material, and the Trustees reasonably relied on the statements. The findings of the district court are not clearly erroneous.

B. The Falkenstein Note

With respect to the Falkenstein note, the

district court found that Buster misrepresented that Falkenstein owned a boat and an airplane, that he had made a $20,000 down payment on the property, and that he was married and his wife was employed. The district court also found that Buster made substantial misrepresentations about the value of improvements on the land, and substantially overstated the acreage of the property. Again, we reject Buster's assertion that these statements were not material. Given the significance of these statements in enabling the Trust to evaluate the likelihood of repayment, the district court's findings as to materiality and reliance are not clearly erroneous.

C. The Kern Note

This distict court also found that Buster misrepresented material facts concerning the Kern property. For example, Buster misrepresented the employment of the payor on the property, the identity and employment of the payor's spouse, and that the property had been inspected. The facts of employment and spouse's income, as well

as whether an inspection occurred, are material to the value of notes secured by deeds of trust. The district court's decisions with respect to the materiality and reliance are not clearly erroneous.

[4] Because the district court's conclusions with respect to materiality and reliance cannot be overturned unless the findings are clearly erroneous, the district court's determination that these misstatements caused the Trust losses in excess of $140,000 must be upheld.

## IV.

## CONCLUSION

We have thoroughly reviewed the remaining issues raised on appeal and cross appeal. We find them to be without merit. The district court's determination that Buster was engaged in a fiduciary relationship with the Trust is proper. The finding that Buster breached his fiduciary duties and the subsequent award of damages are also proper. Based upon the foregoing analysis, the district court's decision is **AFFIRMED.**

FERGUSON, Circuit Judge, dissenting:

In this case, a professional corporation of certified public accountants formed an ERISA trust in which its members were the major beneficiaries. The Trust made returns of 20% per annum on its money by gambling on the Alaskan real estate market. When the market dropped, the Trustees, succeeded in convincing the district court that it was not their mismanagment of the Trust that was to blame for not making a 20% profit on three real estate transactions, but rather the fault of real estate mortgage brokers Jack Buster and Terry Parks, the persons who sold them the mortgage investments.[1] Instead of granting the Trustees' claims on common law fraud, the district court federalized their state tort claims by concluding that one who sells his own property to an ERISA trust is a financial advisor.

[1]The Trust did not lose money on the transactions. It made a net gain of 6%.

In 1977, Buster formed with another person the limited partnership of Kavik Mortgage Investors for the purpose of investing in notes securited by real estate deeds of trust. The ERISA trust invested $50,000 and became a limited partner. The partnership agreement followed standard partnership law, providing that the general partner was a fiduciary to the limited partners. See generally 1916 Uniform Limited Partnership Act, codified in Alaska Statute § 32.10.010 (1993), et seq.

Subsequently, Buster and Parks formed the Northern Financial partnership. Northern Financial bought deed of trust notes at a discount to sell to others for profit. From 1983 to 1986, Northern Financial sold to the Trust thirty-six notes at a cost of $727,000. These investments comprised about 40% of the trust assets.

Buster made significant and overly speculative reports regarding the value of at least four of the notes. When the four notes failed to yield a 20% return after the collapse of the Alaska

real estate market, the Trust brought this action alleging violations of RICO, mail and securities fraud, state law causes of action, common law fraud and ERISA. The action on one note was settled because Buster promised to make good on his guarantee of a 20% percent return on that note. On the other three notes, the district court ruled solely on the ERISA claim.

The majority errs in three major respects. First, it applies the wrong standard of review to the district court's conclusion that Buster is an investment advisor under ERISA. Second, it erroneously assumes that Buster was an investment advisor under ERISA because of his status as a general partner and fiduciary in the Kavik Mortgage Investors partnership. Third, it creates an inter-circuit conflict with the Fifth, Seventh, and Eighth Circuits.

## Standard of Review

The majority errs in applying the clear error rule to the district court's finding that Buster was an investment advisor under ERISA. The

clear error rule governs only historical facts, not the legal conclusion to be drawn from those facts. In re J.A. Thompson & Son, Inc., 665 F.2d 941 (9th Cir. 1982). This court must review the legal conclusion that Buster was an investment advisor under ERISA de novo. Batchelor v. Oak Hill Medical Group, 870 F.2d 1446, 1447 (9th Cir. 1989)(citing Trustees of Amalgamated ins. Fund v. Geltman Indus., Inc., 784 F.2d 926, 929 (9th Cir.), cert. denied, 479 u.S. 822 (1986)). For the reasons stated below, upon a de novo review of the district court record, the majority should have concluded that Buster was not an investment advisor for a fee pursuant to 29 U.S.C. § 1002 (21)(A)(ii) and thus is not subject to ERISA.

Investment Advisor Status

The majority incorrectly assumes that a fiduciary under state law to a trust protected under ERISA is necessarily also an ERISA fiduciary. The earlier partnership agreement between the parties expressly provided that the general partners were fiduciaries of the limited

partners. The district court and the majority assert that once a fiduciary relationship is formed, it exists forever. Assuming that to be true, the fact that a person is a fiduciary under state law does not make him an investment advisor under ERISA. 29 C.F.R. 2510.3-21(c)(1) (1992). See also Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 293 (7th Cir. 1989). An investment advisor is always a fiduciary. But a fiduciary is not always an investment advisor. Id. The majority and district court simply put the cart before the horse.

The majority's analysis fails at two levels. First, one who sells his own property does not become an investment advisor for a fee under ERISA. See e.g. Consolidated Beef Indus., Inc. v. New York Life Ins. Co., 949 F.2d 960, 965 (8th Cir. 1991), cert. denied, 112 S.Ct. 1670 (1992).

In Consolidated Beef, the Eighth Circuit concluded as a matter of law that the seller of a 401(k) turnkey plan "was not providing investment advice...[but rather] was merely a salesper-

son earning commissions and not a fiduciary under ERISA." 949 F.2d at 965. Like the Consolidated Beef sales agent, Buster worked on a commission basis and recommended the purchase of his company's "products" only, rather than that of many companies. Id. Buster sought to sell only those investments which the Northern Financial partnership acquired. His self-interest and loyalties should have been obvious to all parties involved.

Second, viewed on a more general level, a sales broker should not be considered an ERISA fiduciary simply because he is good at his job, "matching the customer's desires with available inventory," even where the sales broker promotes the products of many companies. Farm King Supply, Inc. v. Edward Jones & Co., 884 F.2d 282, 292 (7th Cir. 1989).

In Farm King, the Seventh Circuit concluded that the seller was not an ERISA investment advisor. The court held that all the seller did was "select a few securities from its limited pool of commissionable securities and propose to the

trustees that the Plan purchase from among this select group." 884 F.2d at 292. It considered appellant's "discretionary authority or control" argument under 29 U.S.C. § 1002(21) (A)(i) and its "rendering investment advice" argument under 29 U.S.C. § 1002(21)(A)(ii) and found that the seller was not a fiduciary under either prong.

The Farm King court noted that "stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of those securities and receive a commission for their services" could be found to be ERISA fiduciaries, but only where there existed "some sort of an agreement or understanding...that [the broker/dealer] would provide to the Plan individualized investment advice which would be the primary basis for the Plan's investment decisions." Id. at 293.

The court rejected Farm King's "rendering investment advice" argument, determining that the district court did not clearly err in finding that "there was no mutual understanding that

Jones' advice would be the primary basis for the Plan investments." Id. The court noted that:

> [t]here is nothing in the record to indicate that Jones or its employees had agreed to render individualized investment advice to the Plan, nor that the trustees so agreed. The only 'agreement' between the parties was that the trustees would listen to Jones' sales pitch and if the trustees liked the pitch, the Plan would purchase from among the suggested investments, the very cornerstone of a typical broker-client relationship.

Id.

The same is true in the case at hand. For all the majority makes of the frequency of the parties' meetings and the volume of investments, there is absolutely no indication that Buster or Northern Financial agreed to serve as the primary source of investment advice to the Trustees. Additionally, there is nothing in the record which suggests that the Trustees intended such a mutual agreement or relied on Buster and Northern Financial as their primary basis for investment decisions. See 29 C.F.R. § 2510.3-21(c)(1)(B).

Thus, to the extent the district court found that the parties entered into a mutual agreement

under 29 U.S.C. § 1002(21)(A)(ii), it clearly erred. To the extent that it concluded that Buster and Northern Financial had a mutual agreement based on the fact that Buster and Northern Financial were persuasive sellers of investments to the Trust, the court also erred as a matter of law.

Furthermore, the factual situation in the case at hand is even more compelling than that of Farm King. The Seventh Circuit held that the district court correctly found that Jones was not an ERISA fiduciary where (1) Farm King invested approximately 99% of its assets in investments recommended and purchased through Jones; (2) Jones advised the trustees as to which investments "to hold and which to sell and offer[ed] the trustees a choice of recommended investments"; (3) the trustees never granted to Jones, and Jones never exercised, any control or influence over how the Plan's assets were managed or disposed; and (4) the trustees never supplied Jones with its investment portfolio. 884 F.2d 288

(7th Cir. 1989).

In the instant case, only 40% of the Trust's assets were invested through Buster and Northern Financial. Thus, while 99% of Farm King's investment portfolio was related in some way to its broker, a much smaller percentage of the Trust's economic welfare depended on Buster and Northern Financial's representations. Moreover, as in Farm King, the Trust never supplied Buster or Northern Financial with its investment portfolio. Without it, "individualized investment advise (sic) to the plan based on the particular needs of the plan" could not have been provided. 29 C.F.R. 2510.3-21(c)(1)(ii)(B).

Finally, Buster was compensated for his "services" through commissions. The Trust knew of this arrangement and was aware of the conflict in promoting Buster's interests and that of the Trust. In supporting its conclusion that Buster rendered investment advice for a fee, under 29 U.S.C. § 1002(21)(A)(ii), the majority relies on the district court's findings that

> Buster...provided information to the Trustees as to the value of various deed of trust notes by virtue of the yield calculations, mortgage analyses, and price information. He also provided descriptions of the property, and information pertaining to the payor's payment history and the payor's employment.

Maj. Op. at 5196.

These findings are not at all dispositive. Buster took steps that every effective mortgage broker would take in making a "sales pitch" to a client. Buster had a clear interest in providing this information in order to enhance the attractiveness of the investments to the Trust and to sell the investments.

As in Farm King, the Trustees relied on a number of Buster's recommendations because of the strong performance of past recommendations. However, neither Buster nor the Trustees interpreted this situation as an agreement for Buster to provide individualized advice upon which the trustees would rely as a primary basis for the plans' investment decisions. The relationship between the parties was simply one

of broker-client.

It is especially true in this case because neither Northern Financial nor Buster rendered individual investment advice or made recommendations based on the particular needs of the Trust. In fact, neither Northern Financial nor Buster had any information concerning the assets of the Trust except for the deed of trust and notes which they sold to the Trust.

In concluding to the contrary, the majority applies an inordinately low standard in assessing the applicability of ERISA. Accord Stanton v. Shearson Lehman/American Exp., Inc., 631 F.Supp. 100, 103-04 (N.D. Ga. 1986).

In Stanton, the defendants were found to be ERISA fiduciaries because they went "far beyond this limited involvement," in making "specific, unsolicited recommendations where the client is dependent upon and relies on the broker's special expertise...[and where] the client merely 'rubber stamps' -- follows automatically or without consideration -- the investment recommendations

of the broker." Id. The broker in Stanton played a qualitatively different and much more influential role in her client's investment decisions than Buster did in the Trust's investment portfolio. Notably, the certified public accountants administering the Trust in this case had previously entered into a partnership which sold the same kind of real estate securities which they now bought.

Finally, to the extent the majority categorizes Buster's actions in promoting his investment packages as rendering individualized investment advice, and his commissions from the sale of these investments as compensation for rendering investment advice, it unnecessarily creates an inter-circuit conflict with the Seventh Circuit and other circuits which have followed Farm King and its rationale. See Schloegel v. Boswell, 994 F.2d 266 (5th Cir.), cert. denied, 114 S.Ct. 440 (1993); Olson v. E.F. Hutton & Co., Inc. v. New York Life Ins. Co.; 949 F.2d 960 (8th Cir. 1991), cert. denied, 112 S.Ct. 1670 (1992); Brown v.

Roth, 729 F.Supp. 391, 397 (D.N.J. 1990).

## Conclusion

In summary, the district court and the majority erred in deciding to federalize state common law claims. I would reverse and remand the case to the district court to decide it on state and common law fraud claims.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL, | ) | MEMORANDUM AND ORDER |
| Defendants. | ) | |

A89-071 Civil

Pursuant to Fed. R. Civ. P. 52(a), in actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to Fed. R. Civ. P. 58. Further, purusant to Fed. R. Civ. P. 56(c), if during a trial without a jury a party has been fully heard with respect to an issue, and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party at that time, or wait until the close of all the evidence. The judgment

shall be supported by findings of fact and conclusions of law as required under subdivision (a) described above.

At the close of plaintiffs' case, defendants moved for a directed verdict[1] regarding plaintiffs' state law claim for misrepresentation and the statute of limitations issue. The court took the submitted motions under advisement. Defendants assert that ERISA preempts plaintiffs' common law misrepresentation claim.

Under 29 U.S.C. § 1144(a) of ERISA, the provisions of ERISA "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." The ninth

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[1] As of December 1, 1991 several new rules of civil procedure became effective. One of the changed rules was Fed. R. Civ. P. 50. The new rule abandons the use of the terminology "directed verdict" and replaces it with "judgment as a matter of law." However, the designation of a motion as a request for a directed verdict is merely a formal error and should be treated as a judgment as a matter of law in accordance with the revised rule. Fed. R. Civ. P. 52(c) parallels 50(a) but is applicable to non-jury trials. Further, 52(c) replaces part of Fed. R. Civ. P. 41(b) which formerly authorized a dismissal at the close of plaintiff's case.

circuit has stated that the preemptive provisions of ERISA are to be broadly construed, and that they extend to common law tort claims as well as contract actions. Gibson v. Prudential Ins. Co. of America, 915 F.2d 414, 416 (9th Cir. 1990); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1095 (9th Cir. 1985); Cox v. Eichler, 765 F.Supp. 601, 606 (N.D. Cal. 1990). Claims brought under state law doctrines that do not specifically refer to employee benefit plans are preempted when the claims arise from the administration of such plans, whether directly or indirectly. Ellenburg, 763 F.2d at 1095.

Based on a review of the record and the law, the court finds that plaintiffs' misrepresentation claim is preempted by ERISA. Therefore, defendants' motion is granted as to the issue of misrepresentation. Because the court finds preemption applies, it need not reach the statute of limitation issue. Defendants are directed to file proposed findings of fact and conclusions of law as to the separate claim for misrepresentation on

or before July 2, 1992.[2] The court further directs that the remaining proposed findings of fact and conclusions of law under Local Rule 13 to be submitted to the court be separated into those directed to the Alaska Securities Act claims and those directed to the ERISA claims.

Accordingly, IT IS ORDERED:

(1) THAT defendants' motion for judgment as a matter of law is GRANTED as stated above

(2) THAT separate proposed findings of fact and conclusions of law are to be submitted by July 2, 1992 by defendants as to the misrepresentation claim;

(3) THAT counsel are to file findings of fact and conclusions of law under Local Rule 13 on or before July 2, 1992 regarding the remaining two claims; and

(4) THAT defendants' motion to receive exhibit CA for identification is granted and the

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[2] The court notes defense counsel must be absent from the District until about June 17 or 18.

exhibit may be received and marked.

DATED at Anchorage, Alaska, this 15th day of June 1992.

JAMES A. VON DER HEYDT
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD, Plaintiffs, vs. JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL, Defendants. | ) | FINDINGS OF FACT AND CONCLUSIONS OF LAW |

A89-071 Civil

The above cause was tried to the court at Anchorage, Alaska on June 8, 9 and 10, 1992.

The court heard opening statements, the testimony of witnesses, and final arguments of the parties, following which the case was submitted for decision.

## FINDINGS OF FACT

I. ERISA:

A. Stipulated Facts.

1. Plaintiff Thomas, Head & Greisen Employees Trust ("Trust") was an employee trust for Thomas, Head & Greisen, a professional

corporation, organized and operated pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA").

2. From 1977 to 1983 Jack Buster dealt with Ronald E. Greisen for the purpose of selling him deed of trust notes.

3. During 1977 to 1990, the Trust was a limited partner, and Jack Buster was a general partner, in Kavik Mortgage Investors, a business which invested in deed of trust notes.

4. In 1983, Jack Buster and Terry Parks formed Northern Financial, a general partnership consisting of defendants Jack Buster and Terry Parks as equal general partners.

5. Defendants Jack Buster and Terry Parks, in their capacity as general partners of Northern Financial, dealt with the Thomas, Head & Greisen Employees Trust from 1983 until 1987.

6. At all relevant times during the period when Northern Financial was dealing with the Trust, plaintiffs Ronald E. Greisen and Henry P. Head were trustees of the Trust. Ronald E.

Greisen and Henry P. Head are investors knowledgeable in deed of trust notes.

B. Finding re ERISA Generally.

The Thomas, Head & Greisen Employee Trust is the successor entity to the two separate trusts created for the benefit of the employees of Thomas, Head & Greisen which were merged together in 1980.

C. Falkenstein Note.

1. Stipulated Facts. On or about May 1, 1984, Steven L. Falkenstein executed a promissory note between himself, as payor, and Lawrence Cornett III, as payee. The original principal balance on the note was $29,000 and bore interest at the rate of 10 percent per annum. The note was secured by a deed of trust on a certain parcel of real property located about 25 miles from Glennallen, and described in the deed of trust as the:

> Northeast one-quarter of the Southwest one-quarter of the Northeast one-quarter of the Southwest one-quarter (NE1/4 SW1/4 NE1/4 SW1/4) of Section 11, Township 1 South, Range 1 East, Copper River Meridian, in the Chitina Recording District, Third Judicial

District, State of Alaska.

On or about February 6, 1986, Northern Financial purchased the note from Lawrence Cornett, III, for the sum of $17,158.53. On or about March 7, 1986, the Trust purchased the Falkenstein note for the sum of $21,700. At the time of purchase, payments were current on the note, and the note had a principal balance of $27,803.19.

2. Findings re Falkenstein Note.

a. On or about March 7, 1986, in connection with the sale of the Falkenstein note to the Trust, defendant Terry D. Parks represented to Ronald E. Greisen that (a) the property was located near Glennallen, (b) that the payor Steven Falkenstein grew up in Glennallen, (c) the payor was employed by ARCO (Supply Division) on the North Slope, (d) the payor was married, (E) his spouse was employed as a sixth grade school teacher by the local school district, (f) the payor owned a fishing boat in Valdez, (g) the payor owned an airplane, (h) the property appeared to be 10 acres, more or less, (i) the property

was purchased by Mr. Falkenstein for $49,000, (j) Mr. Falkenstein put $20,000 down when he purchased the property, (k) the property has been substantially improved in the amount of $20,000 by virtue of Mr. Falkenstein's construction of a new barn, fence and a small addition to the house on the property, and (l) Mr. Falkenstein had $40,000 equity in the property, representing his $20,000 down payment and improvements. The court finds these representations were material to the Trust's decision to purchase the Falkenstein note, and that it relied on defendants' representations in doing so. The court further finds that these representations were either intentional or in reckless disregard of truth or falsity.

b. In actuality, (a) the payor grew up in Petersburg, (b) the payor was not then employed by Arco (Supply Division), (c) the payor was not married but had divorced in 1983, (d) the payor's former wife had no teaching certificate and was not employed outside the home, (e) the payor has never owned a fishing boat in Valdez,

(f) or an airplane, (g) the property was actually two and one-half acres more or less, (h) the property was purchased for $29,000, (i) Mr. Falkenstein did not substantially improve the property, (j) Mr. Falkenstein never built a barn or a fence on the property, and (k) Mr. Falkenstein made no down payment on the property.

c. The last monthly payment on the Falkentsein note was February 24, 1987, which brought the interest to current status.

d. The Trust suffered a loss and sustained damages as a result of defendant Northern Financial's breach of fiduciary duty, including interest to June 8, 1992, in the amount of $25,219.21.

e. The court finds that plaintiffs' efforts to mitigate their damages were reasonable under the circumstances of the case.

D. Kern Note.

1. Stipulated Facts. On or about June 18, 1985, Frederick L. Kern executed a promissory note between himself, as payor, and Billie Poole,

Jr. and Bernice Sue Poole, as payees. The original principal balance on the note was $49,500 and bore interest at the rate of 12 percent per annum. The note was secured by a deed of trust on a certain parcel of real property described in the deed of trust and located in the end of the Rainbow subdivision in Wasilla. On or about April 24, 1986, Northern Financial purchased the note from the Pooles for the sum of $30,100. On or about April 28, 1986, defendants communicated to Ronald E. Greisen an offer to sell the note to the Trust. On or about April 29, 1986, the Trust purchased the Kern note for the sum of $36,250. At the time of the purchase, payments were current on the note, and the note had a principal balance of $44,714.07.

2. Findings re Kern Note.

a. On or about April 28, 1986, in connection with the offer and sale of the Kern note, defendant Parks represented to Ronald E. Greisen, as trustee of the Trust, that (a) the payor was a dirt contractor, (b) the payor's

spouse, JoAnn Kern, was employed as an Alaska State Trooper, (c) that she had been so employed for six years, (d) that the payor and his wife had only recently married, and (e) that Terry Parks had inspected the house and it was completed. The court finds these representations material to the Trust's decision to purchase the Kern note, and that it relied on defendants' representations in doing so.

b. The court further finds that these misrepresentations were either intentional or in reckless disregard of truth or falsity.

c. In actuality, the facts were that (a) the payor was a carpenter who sub-contracted his services, (b) the payor's spouse, Patricia Kern, was not then or (c) had she ever been employed as an Alaska State Trooper, (d) she was an unemployed housewife with seven children, and (e) Mr. Parks had not inspected the house.

d. The property securing the Kern note was resold by the Trust on October 1, 1991. Plaintiffs took reasonable steps to mitigate

their damages prior to the sale by restoring the property to salable condition and holding it until real estate values increased.

e. The trust suffered a loss and sustained damages as a result of defendant Northern Financial's breach of fiduciary duty, including interest to June 8, 1992, in the amount of $50,189.55.

E. The Bergin Note.

1. Stipulated Facts.

a. On or about June 25, 1982, John L. and Judy M. Bergin executed a promissory note between themselves, as payors, and William M. and Ruth M. Schofield, as payees. The original principal balance on the note was $56,843.38 and bore interest at the rate of 10 percent per annum. The note was secured by a deed of trust on a certain parcel of real property described in the deed of trust and located in the Woodland Park subdivision in the Spenard area of Anchorage. Northern Financial purchased the note to the Trust. On or about April 29, 1986, the Trust

purchased the Bergin note for the sum of $35,150. At the time of purchase, payments were current on the note, and the note had a principal balance of $50,965.47.

b. In actuality, the property was (a) located in Woodland Park subdivision next to railroad tracks in the Spenard area of Anchorage, and (b) the actual assessed value of the property in 1986 was $143,800.

c. The last payment on the Bergin note was February 25, 1988 which brought the interest to current status.

d. The principal balance at the time of default was $46,377.65 plus interest at 10 percent from February 25, 1988.

e. On or about April 18, 1988 the Trust retained Jack Clark to file suit on the promissory note. On or about June 20, 1988 the State of Alaska, Division of Investments, commenced nonjudicial foreclosure because the $51,027.19 first deed of trust was delinquent. On or about March 23, 1989 the Trust obtained a

judgment against the Bergins for $52,219.50. On April 3, 1989 John L. and Judy M. Bergin filed a Chapter 7 bankruptcy in the Western District of Washington. On or about April 19, 1989, the Trust filed a proof of claim with the bankruptcy court in the amount of $52,376.87. On or about July 7, 1989 the debtors were discharged from their pre-petition obligations. The Trust paid a $22.50 escrow termination fee and expended $773.42 in attorney's fees for a total of $795.92.

2. Findings re Bergin Note.

a. On or about April 18, 1986 in connection with the offer and sale of the Bergin note to the Trust, defendant Buster represented to Ronald E. Greisen, as trustee of the Trust, that the real property securing the note was (a) located east of Merrill Field in the Wonder Park subdivision of Anchorage, and (b) that the assessed value of the property was $166,000.

b. The court finds these representations were material to the Trust's decision to purchase the Bergin note, and that it relied on

defendants' representations in doing so.

c. Access to the Bergin property was and continues to be through an alley, and there is no developed access from the platted street. The court findings defendants' failure to disclose these facts material to the Trust's decision to purchase the Bergin note.

d. The Trust suffered a loss and sustained damages as a result of defendants Northern Financial's breach of fiduciary duty, including interest to June 8, 1992, in the amount of $67,336.95.

e. Plaintiffs took reasonable steps to mitigate their damges by pursuing a judgment against the payors on the note. The court finds it was not unreasonable for plaintiffs to refuse to assume the first deed of trust, held by the State of Alaska, since no equity existed in the property for the second deed of trust.

F. The Smith Note. The Trust suffered no loss and sustained no damages on the Smith note, and therefore the court enters no other finding

and awards no damages on this note.

G. Findings re Fiduciary Status of Defendants.

1. Defendants rendered investment advice to the Trust as to the value of the Falkenstein, Kern, Bergin and Smith notes by virtue of their having presented yield sheets, mortgage analyses, purchase prices and other information to trustee Ronald E. Greisen.

2. Defendants made recommendations as to the advisability of the Trust investing in the Falkenstein, Kern, Bergin and Smith notes by virtue of defendants' investigation into and screening of those notes by applying the investment criteria previously articulated to them by trustee Ronald E. Greisen, and by subsequently presenting those notes to the Trust with a recommendation to purchase them.

3. Defendants rendered investment advice to the Trust on a regular basis as evidenced by the Trust's purchase of 61 notes over a nine and one-half year period.

4. Defendants rendered investment advice to the Trust pursuant to a mutual understanding that defendants' advice would serve as a primary basis for the investment decisions of the Trust, and that defendants' advice would be individualized investment advice based on the particular needs of the Thomas, Head & Greisen Employee Trust, concerning such matters as the Trust's investment policies or strategies, overall portfolio composition or diversification of plan assets. Defendants' advice served as a primary basis for the Trust's investment decisions. In the course of Northern Financial's dealings with the Trust, the Trust invested approximately 40% of its total assets in investments recommended by defendants. The advice rendered by defendants was individualized to the Trust based on its particularized needs. Mr. Greisen personally met with the defendants and discussed the need for diversification of plan assets, both geographically and by asset type, as well as the overall investment strategy of the

Trust. Mr. Greisen articulated paramaters for Trust investments, and defendants were aware of what types of investments were suitable for the Trust. Defendants used the Trust's investment parameters to investigate and screen such notes before they were recommended to the Trust.

Defendants understood that the trustees were relying on them to investigate and screen such notes, and to present only suitable opportunities to the Trust.

Defendants' compensation amounted to thousands of dollars on each of the notes in question; it is unreasonable to assume that Mr. Greisen and Mr. Head would agree to compensation in that amount unless they understood that defendants were providing a substantial service to the Trust in return.

5. Mr. Buster was also a fiduciary to plaintiffs by virtue of his being a general partner, and they being limited partners, in Kavik Mortgage Investors. The court concludes that any reasonable person, when dealing with

another who serves two different masters, only one of which is owed a fiduciary duty, would not proceed before ascertaining which entity he was purporting to be representing.

6. Defendants received compensation for rendering investment advice to the Trust. The price of the notes offered to the Trust were fixed by defendants to yield a 20% return to the Trust on its invested funds.

7. In late April or early May of 1986, defendant Jack B. Buster was aware that the Falkenstein, Kern and Smith notes had been sold to the Trust by Northern Financial. Mr. Buster considered these notes unsuitable investments for the Trust. In a conversation with Mr. Greisen, Mr. Buster expressed his surprise that the Trust had purchased the notes in question.

At that time, Northern Financial had a fiduciary duty to advise the Trust that the notes in question were not suitable investments for the Trust, and the reasons for such a conclusion.

II. ALASKA SECURITIES ACT. The court finds the

award of damages to plaintiffs under ERISA to be fully adequate under the law and evidence in this case, and therefore enters no Findings or damage award under the Alaska Securities Act.

III. ASSIGNMENT. The Trust has assigned to the plaintiffs Ronald E. Greisen and Henry P. Head the causes of action which are the subject of this litigation.

IV. The court finds plaintiffs' proof insufficient by a preponderance of the evidence regarding defendants' financial profit and therefore awards plaintiffs no damages thereon.

## CONCLUSIONS OF LAW

I. GENERAL.

A. The court has jurisdiction.

B. Defendant Northern Financial and individual defendants Jack B. Buster and Terry D. Parks are liable for any breach of fiduciary duty by any of the defendants, by virtue of the general partnership between Jack B. Buster and Terry D. Parks.

C. The interest acquired by the Trust in

purchasing the deed of trust notes in each of the four tranactions at issue was an interest in real property.

D. Defendant Jack B. Buster owed a fiduciary duty to Thomas, Head & Greisen Employees Trust by virtue of his being a general partner in Kavik Mortgage Investors and the Trust being a limited partner in that venture.

II. ERISA.

A. Defendants were fiduciaries within the meaning of 29 U.S.C. § 1002(21)(a)(2) and 29 C.F.R. § 2510.3-21, by virtue of having rendered investment advice for a fee pursuant to a mutual verbal understanding whereby the investment advice rendered by defendants would serve as a primary basis for investment decision by the Trust, and that the investment advice would be individualized to the Trust based on the Trust's particularized needs, incident to the four transactions at issue in this case.

B. Defendants breached the prudent man standard of ERISA with respect to each of the

three transactions in question by failing to act with the care, skill, prudence and diligence under the cirucmstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

C. Defendants breached their fiduciary duty to the Trust under ERISA by making untrue statements of material fact in connection with the offer and sale of the notes in question to the plaintiff Trust.

D. Defendants breached their fiduciary duty to the Trust under ERISA by failing adequately to investigate the information they passed on to the Trustees regarding (1) the collateral on the notes and (2) the payor's ability to make payments on the notes.

E. Defendants breached their fiduciary duty to the Trust under ERISA by failing to disclose that access to the Bergin property was through an alley, that there was no developed

access from the platted street, and the property was located in the Spenard area of Anchorage.

F. Mr. Buster and Northern Financial breached their fiduciary duty to the Trust under ERISA by failing to disclose that the Falkenstein, Kern and Bergin notes were unsuitable investments for the Trust, which disclosure would have revealed Mr. Parks' misrepresentations and allowed the Trust to avoid or mitigate its loss.

G. That the plaintiffs are entitled to judgment against the defendants in the total sum of $142,745.71, plus costs, interest and reasonable attorney fees.

Plaintiffs' counsel may prepare a proposed final judgment form in conformity herewith for the signature of the court.

DATED at Anchorage, Alaska, this 29th day of July, 1992.

JAMES A. VON DER HEYDT
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL, | ) | FINAL JUDGMENT |
| Defendants. | ) | |

A89-071 Civil

This action, having been tried before the court and the court having rendered written Findings of Fact and Conclusion of Law dated July 29, 1992,

IT IS ORDERED AND ADJUDGED that plaintiffs shall recover from defendants Jack B. Buster, Terry D. Parks and Northern Financial jointly and severally the principal amount of $142,745.71 plus prejudgment interest from June 8, 1992 to August 17, 1992 in the amount of $1334.19, attorney fees to be later awarded by the court upon proper motion and supporting data, and costs

in the amount of $_____for a total judgment of $_____. This judgment shall bear interest from the date hereof at the rate of 3.51% per annum until paid in full.

DATED at Anchorage, Alaska, this 17th day of August, 1992.

JAMES A. VON DER HEYDT
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
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| THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN; HENRY P. HEAD, Plaintiffs-Appellees, | ) | No. 92-36732 |
| v. | ) | D.C. No. CV-89-071-JVH |
| JACK BUSTER, Defendant-Appellant, and TERRY D. PARKS and NORTHERN FINANCIAL, Defendants. | ) | ORDER |

Appeal from the United States District Court for the District of Alaska

Before: GOODWIN, HUG, and FERGUSON, Circuit Judges.

Judge Goodwin and Judge Hug have voted to deny appellant's petition for rehearing. Judge Ferguson has voted to grant appellant's petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc, Judge Goodwin has recommended rejection of the suggestion for rehearing en banc, and Judge Ferguson has no

recommendation for the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Supreme Court, U.S.
FILED
DEC 28 1994
OFFICE OF THE CLERK

No. 94-970

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JACK B. BUSTER

Petitioner

v.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN; HENRY P. HEAD

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENTS BRIEF IN OPPOSITION

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SUPREME COURT RULE

Supreme Court Rule 10 . . . . . 4

## I. APPLICABLE STATUTES AND REGULATIONS

This case involves 29 U.S.C. § 1002(21)(A)(ii) and 29 C.F.R. § 2510.321(c)(i) (1992) which set forth the factors for determining when a person is a fiduciary with respect to a trust established under the Employee Retirement Income Security Act (ERISA).

Petitioner Buster's citation to 29 U.S.C. §§ 1002(14)(A), 1106(a)(1), 1109(a), and 1131 is erroneous because Buster's questions in this case present no controversy which makes them applicable.[1]

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[1] These sections of ERISA and Buster's arguments appearing at 22-24 of his petition, with respect to parties in interest and prohibited transactions do not relate to issues in this case. Buster relies on these statutes and arguments in a retaliatory action Buster recently commenced against Ronald Greisen and others in state court, which action was removed to the United States District Court for the District of Alaska. See Buster v. Greisen, No. A94-0475 CV (JKS) (D. Alaska, Dec. 14, 1994) (Order Denying Remand Attached as Appendix). Of course, this Court should not consider the arguments while they are pending before a United States District Court.

## II. STATEMENT OF THE CASE

Petitioner Jack Buster is dissatisfied with the trial court's findings of fact and the affirmation of those findings by the United States Court of Appeals for the Ninth Circuit. See Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114 (9th Cir. 1994). Therefore, Buster seeks a second appellate review of factual determinations.

District Court Judge von der Heydt for the District of Alaska determined that Petitioner Buster was a fiduciary within the meaning of ERISA by articulating findings of fact relating to each of the five factual elements of fiduciary status expressed in 29 U.S.C. §1002(21)(A)(ii) and 29 C.F.R. 2510.3-21(c)(1) (1992). The trial court also found Buster had breached his fiduciary duties by making "untrue statements of material fact" and "misrepresentations" in connection with the sale of notes secured by unique parcels of real estate to the trust. The court of

appeals concurred in these factual determinations. These facts compel the result obtained below.

## III. SUMMARY OF ARGUMENT

None of the special and important reasons which sometimes warrant a grant of a writ of certiorari exist in this case. In resolving this dispute, the trial court was not required to construe ambiguous statutory language or to inquire into the intentions of Congress in enacting ERISA. The trial court was not required to navigate uncharted legal waters or make legal rulings which affect the general public as opposed to the parties to this dispute.

By affirming the decision of the trial judge, the court of appeals did not construe or interpret ERISA and did not make rulings of law which conflict with courts of appeal for other circuits as Petitioner contends.

Other courts of appeal have affirmed

findings of fact made in the context of distinct relationships that a person or entity was not a fiduciary within the meaning of ERISA. However, these decisions do not reflect an inter-circuit conflict in the interpretation of ERISA. Rather, they confirm the factual nature of the questions presented and reflect the different results the differing facts required. The factual dispute presented by Buster's petition simply does not merit review by this Court.

## IV. ARGUMENT

### A. Factual Disputes Merit No Review By This Court.

Only very special cases merit this Court's discretionary review on writ of certiorari. Supreme Court Rule 10. This dispute is not a special case.

Early this century, this Court dismissed a writ issued to the Ninth Circuit as improvidently granted when it found after

careful review that there was no real conflict between the circuits, but rather distinct facts requiring different results:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). Similarly, this case merits no review.[2]

Petitioner presents this Court with five

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[2] Even assuming arguendo this case created a conflict among circuit courts of appeal, this is not a case in which principles were announced of importance to anyone except the litigants in this case which resulted in a judgment in an amount less than $150,000, exclusive of interest and costs. In such circumstances, denials of certiorari are often issued in spite of an apparent conflict between circuits. See Beaulieu v. United States, 497 U.S. 1038 (1990).

questions of fact labeled "legal conclusions." The questions presented are not questions of law.[3] Rather, they articulate the five factual elements which must be addressed to determine whether a person has acquired fiduciary status within the meaning of 29 U.S.C. § 1002(21)(A) by rendering investment advice for a fee or other compensation.[4]

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[3] In his brief as appellant to the United States Court of Appeals for the Ninth Circuit, Buster presented these same questions to the court as questions of fact and argued in conclusion that the "district court's finding that Northern Financial and its partners became fiduciaries to the trust by rendering investment advice for a fee as a primary basis for investment decisions by the trustees is clearly erroneous." Brief of Jack B. Buster, Appellant at 48, Thomas, Head & Greisen v. Buster, 24 F.3d 1114 (9th Cir. 1994) (No. 92-36732). Buster's attempt to invoke a new standard of review at this stage in the proceedings is disingenuous. As discussed more fully below, the decisions upon which Petitioner relies affirm that the questions Petitioner presents are questions of fact.

[4] In the proceeding below, the courts considered the facts in light of the follow-

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ing statutory and regulatory language:

29 U.S.C. 1002(21)(A) provides in part:

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent . . . (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . .

29 C.F.R. 2510.3-21(c)(1) (1992) provides:

> (c) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of [29 U.S.C. § 1002(21)(A)(ii)] only if:
>
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) Such person either directly or indirectly (e.g., through or together with any affiliate) --
>
> (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to

All five questions presented to this Court were resolved in July 1992 by District Court Judge James A. von der Heydt after careful consideration of evidence presented at trial.[5]

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> purchasing or selling securities or other property for the plan; or
>
> (B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan . . . that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

[5] The court of appeals affirmed each of the findings of fact relating to Buster's fiduciary status concluding that many were "well supported by the evidence." Buster, 24 F.3d at 1120. The findings were as follows:

Findings re Fiduciary Status of Defendants.

1. Defendants rendered investment advice to the Trust as to the value of the Falkenstein, Kern, Bergin and Smith notes by virtue of their having presented yield sheets, mortgage analyses, purchase prices and other information to trustee Ronald E. Greisen.

2. Defendants made recommendations as to the advisability of the Trust investing in the Falkenstein, Kern, Bergin and Smith notes by virtue of defendants' investigation into and screening of those notes by applying the investment criteria previously articulated to them by trustee Ronald E. Greisen, and by subsequently presenting those notes to the Trust with a recommendation to purchase them.

3. Defendants rendered investment advice to the Trust on a regular basis as evidenced by the Trust's purchase of 61 notes over a nine and one-half year period.

4. Defendants rendered investment advice to the Trust pursuant to a mutual understanding that Defendants' advice would serve as a primary basis for the investment decisions of the Trust, and that defendants' advice would be individualized investment advice based on the particular needs of the Thomas, Head & Greisen Employee

Trust, concerning such matters as the Trust's investment policies or strategies, overall portfolio composition or diversification of plan assets. Defendants' advice served as a primary basis for the Trust's investment decisions. In the course of Northern Financial's dealings with the Trust, the Trust invested approximately 40% of its total assets in investments recommended by defendants. The advice rendered by defendants was individualized to the Trust based on its particularized needs. Mr. Greisen personally met with the defendants and discussed the need for diversification of plan assets, both geographically and by asset type, as well as the overall investment strategy of the Trust. Mr. Greisen articulated parameters for Trust investments, and defendants were aware of what types of investments were suitable for the Trust. Defendants used the Trust's investment parameters to investigate and screen such notes before they were recommended to the Trust.

Defendants understood that the trustees were relying on them to investigate and screen such notes, and to present only suitable opportunities to the Trust.

Defendants' compensation amounted to thousands of dollars on each of the notes in question; it is unreasonable to assume that Mr. Greisen and Mr. Head would agree to

compensation in that amount unless they understood that defendants were providing a substantial service to the Trust in return.

5. Mr. Buster was also a fiduciary to plaintiffs by virtue of his being a general partner, and they being limited partners, in Kavik Mortgage Investors. The court concludes that any reasonable person, when dealing with another who serves two different masters, only one of which is owed a fiduciary duty, would not proceed before ascertaining which entity he was purporting to be representing.

6. Defendants received compensation for rendering investment advice to the Trust. The price of the notes offered to the Trust were fixed by defendants to yield a 20% return to the Trust on its invested funds.

7. In late April or early May of 1986, defendant Jack B. Buster was aware that the Falkenstein, Kern and Smith notes had been sold to the Trust by Northern Financial. Mr. Buster considered these notes unsuitable investments for the Trust. In a conversation with Mr. Greisen, Mr. Buster expressed his surprise that the Trust had purchased the notes in question.

At that time, Northern Financial had a fiduciary duty to advise the Trust that the notes in ques-

The court of appeals considered Buster's claim that each of the findings was erroneous and affirmed each finding. Buster, 24 F.3d at 1120.

Facts established by a district court and concurred in by a court of appeal merit no review by the Supreme Court.

> A court of law such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Manufacturing Co. v. Linde Co., 336 U.S. 271, 274-275 (1949) (citing cases).

In Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987), this Court reviewed issues relating to the discriminatory intent required to prove a civil rights claim and

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> tion were not suitable investments for the Trust, and the reasons for such a conclusion.

See Petition for Writ of Certiorari at A55-A58.

upheld findings that the parties had discriminated on racial grounds in violation of statute. This Court noted that:

> The court of appeals did not set aside any of the district court's findings of fact that are relevant to this case. That is the way the case comes to us, an both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task.

Id. at 665. See also Rogers v. Lodge, 458 U.S. 613, 623 (1982); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967).

The resolution of the dispute in Goodman, involving the trial court's findings of historical fact and application of statute to those facts, reflects the same process which occurred in the present case. Buster's petition invites this Court to undertake the same review of the record and reconsideration of the evidence the Court declined in Goodman. The findings of fact in this case, noted above, made by District Court Judge von

der Heydt, stand unassailed as affirmed by the court of appeals. Buster has presented this court with no reason for reviewing or disturbing these facts.[6]

**B. No Inter-circuit Conflict Exists.**

Petitioner contends that the decision below conflicts with decisions of other United States Courts of Appeal. No conflict exists.

Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288 (7th Cir. 1989),

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[6] Occasionally, without elaboration, Buster argues that affirmation of the findings of the trial court required the court of appeals to "construe ERISA." (See Petition at 26, 32) Buster does not develop this argument because he cannot. Neither the trial court nor the court of appeals were called upon to interpret ambiguous statutory or regulatory language to resolve this dispute. Buster's arguments present none of the analysis of statutory language which mark cases involving statutory construction. Compare, e.g., McElroy v. United States, 455 U.S. 642, 643 (1982); Shapiro v. United States, 335 U.S. 1, 4 (1948). Buster's argument rests entirely on comparisons of this decision with other court decisions, which decisions the Ninth Circuit appropriately distinguished on their facts.

upon which Petitioner primarily relies, demonstrates the factual nature of the present dispute and supports the conclusion no further review of this case is warranted.

In Farm King, trustees of an ERISA trust argued that a brokerage firm was a fiduciary because it rendered individualized investment advice pursuant to a mutual agreement and received compensation therefore. 884 F.2d at 293. Analyzing this argument, the Seventh Circuit applied the definition of a fiduciary expressed in 29 U.S.C. § 1002(21)(A)(ii) and the "unassailed regulations further explaining when a person is deemed to be providing investment advice." Id. at 291. The court made no further analysis of the controlling statutory and regulatory language. Recognizing the fact intensive nature of the dispute, the court of appeals affirmed the decision of the trial court applying a clearly erroneous standard of review.

As in this case, the appellants in Farm

King argued that the findings of the district judge with respect to the elements of fiduciary status were mixed findings of fact and law which warranted de novo review. Id. at 293. The court rejected this argument as follows:

> [W]hether the parties agreed that Jones would provide investment advice which would be the primary basis for investments, turns on the evidence heard at trial. Did the parties have such an agreement? The issue here is comparable to the corresponding "meeting of the minds" component of contract cases. Whether a meeting of the minds exists is an issue for the trier of fact. Consequently, the finding in question made by the district judge is solely a factual matter and thus reversible only upon a showing that the determination was clearly erroneous.

Id. at 293 n.6 (citations omitted).

The trial court determined that there was no mutual understanding as required by ERISA. Because this determination was supported by the record, the court of appeals affirmed the decision. Id. at 293-94. See also Consol. Beef Indus., Inc. v. New York

Life Ins. Co., 949 F.2d 960, 965 (8th Cir. 1991), cert. denied, 112 S.Ct. 1670 (1992) (affirming trial court's factual determination whether entity was a fiduciary within the meaning of ERISA).

In the same way, the Ninth Circuit in this case appropriately concurred in the trial court's findings of fact which controlled the results in this case. As is clear from the findings in this case of District Judge von der Heydt noted above, the relationship between Jack Buster and the Thomas, Head & Greisen Employees Trust was different from the relationships analyzed in Farm King and the other decisions relied upon by Buster. The distinct facts regarding these different relationships simply call for different results.

## V. CONCLUSION

Petitioner Jack Buster argued before the court of appeals that the facts found in this

case were clearly erroneous. Buster did not prevail. Buster now brings the same argument to this court attempting to disguise questions of fact as questions of law. Buster's argument that a conflict exists between courts of appeal lacks merit because the decisions merely reflect the different results required by distinct facts.

The findings of fact made in this case compel the result obtained below. Petitioner has presented this Court with nothing which

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merits further review. Mr. Buster's petition should be denied.

RESPECTFULLY SUBMITTED this 27TH day of December, 1994.

BLISS & WILKENS
Lawyers for Respondents

By: _____
Ronald L. Bliss,
Counsel of Record

By: _____
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**MINUTES OF THE UNITED STATES DISTRICT COURT**
**DISTRICT OF ALASKA**

**Jack Buster v. Ronald Greisen, et al.**
Case No. A94-0475 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Marvel Hansbraugh,
Case Management: 271-5575*

PROCEEDINGS: ORDER FROM CHAMBERS

Thomas, Head & Greisen Employees Trust (the "Trust") sued Jack Buster in Federal Court pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1001, et seq. This Court had federal question jurisdiction. 28 U.S.C. § 1331. The Trust argued that Buster, a fiduciary under the Act, had fraudulently induced the Trust to acquire certain assets. See 29 U.S.C. § 1109(a) (making fiduciaries personally liable for inter alia fraud). The Act, which the Supreme Court has described as a, "comprehensive and reticulated statute", see Nachman Corp. v.

PBGC, 446 U.S. 359, 361 (1980), with, "six carefully integrated civil enforcement provisions", Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985), was intended to provide a comprehensive system of civil recovery for those defrauded by fiduciaries. See, e.g., Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993). Judge Von Der Heydt of this Court heard evidence and found in favor of the Trust, concluding that Buster had defrauded it in numerous particulars. He awarded judgment against Buster in the sum of $142,745.71. This judgment was affirmed on appeal. Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3rd 1114 (9th Cir. 1994).

Thereafter Buster commenced this action in State Court against three of the plaintiffs in the federal court case: Ronald E. Greisen, Henry P. Head, and David L. Ratchye. In this action Buster argued that Greisen and the others failed to disclose to him that his actions

made him a fiduciary under federal law who could be used in federal court for fraud. Failure to advise him regarding his duties under federal law, Buster continues, lead to his being successfully sued in federal court and having a judgment rendered against him. He seeks recovery for the costs and attorney's fees he incurred in federal court, the amount of the judgment against him, plus damages for injuries to his reputation from being branded a crook in federal court. He asks for $1,000,000.

Greisen and the others removed this case to federal court. 28 U.S.C. § 1441(b). Buster seeks a remand. Docket No. 7. He argues that his action is purely one of state law founded on Restatement (Second) Torts § 551 (1977). See Turnbull v. LaRose, 702 P.2d 1331 (Alaska 1985). In context, it appears that Buster is really suing for a variation of abuse or process; he is being dragged into court and required to defend and incur costs

and the damage to his reputation from losing the lawsuit which constitutes his damages. Generally, this Court would not have removal jurisdiction over an action for abuse of process or malicious prosecution even if the process allegedly abused was the process of this Court. See, e.g., Tarkowski v. County of Lake, 775 F.2d 173 (7th Cir. 1985); Fisher v. White, 715 F. Supp. 37 (E.D. N.Y. 1989); Owens v. First City Nat. Bank of Beaumont, 714 F. Supp. 227 (E.D. Tex. 1989); Voors v. Nat. Women's Health Organization, Inc., 611 F. Supp. 203 D.C. Ind. 1985). An exception to this rule exists where the original plaintiff sued on a cause of action expressly granted by Congress and the state court suit attacks that action. See, e.g., Nationwide Charter and Conventions, Inc. v. Garber, 254 F. Supp. 85 (D. Mass. 1966). In such a case there is a real risk that a litigant will use state process as a means of retaliation against the bringing of an action expressly authorized by

Congress. To permit such an action to proceed in state court would seriously jeopardize this Court's power to grant relief to litigants pursuing ERISA remedies under federal law. Consequently, federal common law provides a defendant in such a suit a federal remedy in order to protect and vindicate his Congressionally granted statutory rights and this Court has jurisdiction under 28 U.S.C. § 1331.

In order to prevail, Buster must convince a court that the Trustees of an ERISA trust are under an obligation to inform potential swindlers of their obligations under federal law or suffer the cost and expense of state court litigation where the trustee successfully sues the swindler in federal court.[1] Such potential law suits could not help but

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[1] My decision in this case makes it unnecessary to determine whether Buster's current claims were compulsory counterclaims in the Trust's federal court action against him. See Fed. R. Civ. P. 13(a).

chill reliance on the remedies established by Congress in 29 U.S.C. § 1132(a)(2). In such a case, the federal common law should provide a remedy to protect ERISA from retaliatory lawsuits. Under the circumstances, 29 U.S.C. § 185(a) provides this court with jurisdiction. See, e.g., Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). Alternatively, this Court would have jurisdiction under 28 U.S.C. § 1331, since the common law would provide a federal remedy for retaliatory lawsuits of this kind brought in state court.[2]

**IT IS THEREFORE ORDERED:**

The motion for Remand and for Costs at **Docket No. 7 is DENIED.**

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[2] The close nexus between the chilling effect permitting lawsuits like Buster's to proceed in state court would have on the remedies set out in 29 U.S.C. § 1132 serves to distinguish this case from the general rule that there is no federal law regarding abuse of process. See, e.g., Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: December 14, 1994

SECRETARY'S INITIALS: ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER.

C.F. No. 1

(3)

Supreme Court, U.S.
FILED
JAN 3 1995
OFFICE OF THE CLERK

No. 94-970

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1994**

JACK B. BUSTER,

Petitioner,

v.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST, RONALD E. GREISEN; HENRY P. HEAD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# REPLY BRIEF IN SUPPORT OF PETITION

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## I. INTRODUCTION

Respondents' Brief in Opposition to the Petition for Certiorari raises issues for the first time in this proceeding which evoke a reply. One of the new issues is substantial; of the other two, one involves a disingenuous misstatement of the magnitude of this controversy and the other gratituously denigrates the petitioner. The first will be discussed in appropriate depth and the other two in appropriate brevity.

## II. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

### There Is a Real and Embarrassing Conflict of Opinion and Authority Between the Circuit Courts of Appeals.

This court has recognized that ERISA is a "comprehensive and reticulated statute," the product of a decade of Congressional study of the nation's private employee benefit systems. Mertens v. Hewitt Associates, __ U.S. __, 113 S.Ct. 2063, 2066 (1993). This court recognized ERISA's enforcement scheme as "carefully crafted

and detailed," providing strong evidence that remedies not provided by Congress were not omitted simply because Congress forgot to incorporate them expressly. Mertens, 113 S.Ct. at 2067. It thus is apparent that all enforcement provisions of the statute were "carefully crafted" to embody the intent of Congress.

Consequently, the respondents' contention that Buster's citation to 29 U.S.C. 1002(14)(A), 1106(a)(1), 1109(a) and 1131 is erroneous is totally lacking in merit. It is incumbent on the federal courts to construe the statute as a harmonious whole. When that is done, it is impossible to escape the obvious result, i.e., that if Buster was a fiduciary to the Plan, any sale by him of an investment to the Plan was a prohibited transaction, which also involved commission of a misdemeanor by the Plan Trustees with respect to each such transaction. When the court recognizes and enforces any such transactions, it not only condones, but becomes a participant in, violations of disciplinary provisions carefully

crafted by Congress to protect the integrity of the private employee benefit system. This appears to be the only case in which a circuit court of appeals has granted relief to trustees of a plan based on their indulgence in prohibited transactions, thus rewarding them for violating the enforcement provisions which are "the product of a decade of Congressional study."

As this court has stated, ERISA is a reticulated statute, an interwoven network of harmonious provisions which form a web reflecting the overall intent of Congress. If all of the provisions of the Act are considered together, in order to conclude that Buster and the Plan Trustees had a meeting of the minds necessary for Buster to be a fiduciary as an investment advisor, the court would have to conclude that at least the Trustees, and possibly Buster, intended to engage in prohibited transactions as well as misdemeanors. If the District Court reached such a conclusion, it became a participant in breaking the law when it enforced the illegal

transactions. On the other hand, if the District Court disregarded the important enforcement provisions of the reticulated statute, it erred in construing the statute. Either way, its legal conclusions should not be upheld. Either way, the Court of Appeals erred.

This case cannot be construed as a factual dispute. There was no factual dispute involved in the appeal and there is no factual dispute involved in the present petition. Both the appeal and this petition take for granted the District Court's findings of historical fact.[1]

Other courts of appeals have avoided the dilemma inherent in the decision of the Ninth Circuit Court of Appeals in this case. That dilemma is that it is inherent in the majority opinion of the Ninth Circuit that only certain

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[1]At the trial there was almost no dispute about the circumstances of the transactions. The dispute was about the conclusions from those transactions. The fact dispute at trial was whether or not there were any misrepresentations, but the District Court's findings as to that issue are not an issue in this petition.

provisions of the ERISA statute were considered with total disregard of other provisions, resulting in a decision which is abhorrent to the reticulated statute; or, the Court of Appeals has condoned and joined in violations of the statute. The other courts of appeals have recognized the conflict of interest, as well as the explicit prohibition by Congress, in a person who is selling his own products being a fiduciary. A fiduciary must have undivided loyalty and act in the best interest of the beneficiary, which is contrary to human nature for a person selling his own products, who, if he wants to stay in business, must look out for his own best interest. Buster recognized this in his trial testimony: "I simply can't serve two masters. I can't serve my own needs and someone else's at the same time" (RT 2-111).

All others courts of appeals that have considered analogous fact situations[2] have recognized that an individual or company selling its own property, or a broker being compensated only from commissions on sales, cannot be an ERISA fiduciary. American Federation of Unions v. Equitable Life Assurance Society, 841 F.2d 658, 664 (5th Cir. 1988)("Simply urging the purchase of its products does make an insurance company an ERISA fiduciary with respect to those products." and, "Equitable had no control whether the Fund would accept or reject its advice to self-insure.");[3] Consolidated Beef Industries v. New York Life Insurance Co., 949 F.2d 960, 965 (8th Cir. 1991)("Billings was merely a salesperson earning commission and not a fiduciary under ERISA"; "NYL had no such control over CBI's ERISA

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[2]As Judge Ferguson pointed out in his dissenting opinion, the facts are more compelling in this case. Appendix to Petition at A32.

[3]There is no evidence that Buster gave any advice other than descriptive information about the deed of trust packages he offered for sale.

funds. NYL simply sold CBI annuities; it did not recommend specific investments beyond its own products."); Brown v. Roth, 729 F.Supp. 391, 396 (D.N.J. 1990)("To presume Brown's transfer of funds resulted solely from Roth's influence is to presume that Brown is without general business acumen.");[4] Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 294 n. 8 (7th Cir. 1989)("Moreover, because of the compensation scheme, the trustees had to be aware that if Jones were truly a fiduciary by providing advice which the trustees were relying on as a primary basis for the Plan's investments, then every investment made through Jones would violate the party in interest prohibited transaction rule of ERISA, 29 U.S.C. § 1106.") In Olson v. E.F. Hutton & Co. Inc., 957 F.2d 622, 626 (8th Cir. 1992), the court recognized that the regulations, 29 C.F.R. 2510.3-21(c)(1) (1992) (ii)(B), were adopted to ensure that brokers are not given fi-

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[4]It is undisputed that the respondents were very sophisticated investors.

duciary status without their knowledge. It seems obvious that a seller or broker cannot be a party to a "meeting of the minds" as contemplated by the regulation without his knowledge.[5]

Thus, the conflict between the Ninth Circuit Court of Appeals and the other circuits is not only obvious and embarrassing, it creates a situation in which no brokerage company, no seller of securities, and no insurance company can dare to enter into any transactions with any ERISA Plan within the jurisdiction of the Ninth Circuit Court of Appeals, while the decision in this case stands, unless they have the confidence that because of their wealth and financial power they will receive more favorable treatment from the courts than Buster has received. It is folly to assert, as the respondents do, that the decision of the Court of Appeals in this case

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[5]The majority of the Ninth Circuit panel recognized that Buster did not know or believe he was a fiduciary. Appendix to Petition at A10.

affects no one except the parties involved.[6] The decision of the Court of Appeals in this case affects not only these parties, but also the millions of participants in ERISA plans within the jurisdiction of the Ninth Circuit as well as all individuals, corporate entities and others who may consider doing business with ERISA plans.

Of course, the amount of the Judgment in this case is not Buster's sole stake. Buster has suffered many other damages as a result of the decision in this case, as related in the District Court Order set forth in the Appendix to the respondents' Brief, which they have included for no apparent purpose other than the gratuitous

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[6]The respondents attempt to portray the decision in this case as too insignificant for this court's attention not only by incorrectly asserting that it affects no one but these parties, but also by disingenuously stating (see footnote 2 at page 5 of Respondents' Brief in Opposition) that the amount involved is less than $150,000, when in reality, the Judgment is more than double that amount. See the summary included as an Appendix hereto, which Buster's counsel certifies to be correct.

denigration of Buster's motives and character.[7]

## III. CONCLUSION

This case is important not only to the parties involved, but to millions of ERISA Plan participants as well as all who do or contemplate business with ERISA Plans.

The decision of the Court of Appeals in this case is erroneous for the reasons set forth here and in the main petition. This court is urged to grant the Petition for Certiorari and consider the case on its merits.

Dated the 10 day of January, 1995.

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[7]Only by an enormous exercise of self discipline has Buster's counsel refrained from including here as an Appendix Buster's Motion to Reconsider the District Court Order set forth in the Appendix to the respondents' brief, detailing the inaccuracies and inappropriateness of the District Court's pre-judgment of a case over which it has erroneously retained jurisdiction.

**SUMMARY OF AWARDS**

The Final Judgment of the District Court in the Appendix of the Petition for Certiorari (A63-A64) leaves blank spaces for the amounts of attorneys fees, costs and total judgment to be awarded. The following additions have been made:

| | | |
|---|---|---|
| 04/05/93 - | Amended Final Judgment | $190,057.64 |
| 05/28/93 - | Award of Post-Judgment Attorney's Fees | 25,000.00 |
| 09/22/94 - | Attorneys' Fees Awarded by Court of Appeals | 23,929.90 |
| 09/22/94 - | Award of Costs by Court of Appeals | 343.92 |
| 11/16/94 - | Award of Post-Judgment Costs by District Court | 12,292.95 |
| 12/22/94 - | Award of Post-Judgment Attorneys' Fees by District Court | 58,604.00 |
| | Total: | $310,228.41 |